

<p>In the Matter of</p> <p>THE OGUNQUIT PLAYHOUSE FOUNDATION</p> <p>Employer¹</p> <p>and</p> <p>BOSTON MUSICIANS' ASSOCIATION, a/w AMERICAN FEDERATION OF MUSICIANS, LOCAL UNION NO. 9-535, AFL-CIO</p> <p>Petitioner</p>	<p>Case 1-RC-22423</p>
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**UNITED
STATES OF
AMERICA
BEFORE THE
NATIONAL
LABOR
RELATIONS
BOARD
FIRST REGION**

**DECISION AND
DIRECTION OF
ELECTION**²

Petitioner Boston Musicians' Association (the Union) seeks to represent a bargaining unit of

musicians employed by the Ogunquit Playhouse Foundation, Inc. (the Playhouse). The Playhouse maintains that all of the petitioned-for musicians are independent contractors who are, therefore, not employees within the meaning of Section 2(3) of the Act, while the Union maintains that they are statutory employees. Should I find that the musicians are statutory employees, the Petitioner seeks to employ an eligibility formula under which musicians who have worked two productions over the past two seasons would be eligible to vote, while the Playhouse has not proposed a particular eligibility formula.

¹ The name of the Employer and Petitioner appear as amended at the hearing.

² Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: (1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; (2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; (3) the labor organization involved claims to represent certain employees of the Employer; and (4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ The parties have stipulated, and I find, that the counselors who work in the children's summer camp program shall be excluded from any unit found appropriate.

⁴ The only witnesses at the hearing were Rubino and musician Zachary Chadwick.

⁵ Levinstein also oversees a production manager who, in turn, oversees various crews headed by a technical director, costume designer, a props master, master electrician and audio engineer. Kenney also oversees the marketing, public relations, and children's theater departments.

⁶ The Playhouse also hires some individuals with the title of "assistant musical director" and "associate musical director." The parties have stipulated, and I find, that the assistant musical directors and associate musical directors should be included in any unit found appropriate.

⁷ Rubino testified that he and Kenney together negotiate contracts with theatrical unions that have employees at the Playhouse.

⁸ The five “main stage” shows do not overlap with one another. The Playhouse has also performed “Disney’s High School Musical,” which played only two to three times per week and overlapped with all of the other shows.

⁹ Currently, the productions are predominantly musicals, and it appears that the Playhouse hires its own musicians for most productions. Not all of its productions, however, have required the Playhouse to hire musicians. In some past seasons, the Playhouse has presented some drama-type productions. Some musicals come with “canned” packages, i.e., tapes or soundtracks. Some shows, referred to as “presented” or “package” shows are produced by another entity that provides its own musicians. All six of the 2009 shows, six of the seven 2008 shows, and four or five of the 2007 shows were produced by the Playhouse itself.

¹⁰ Rubino testified that Purdy was an independent contractor.

¹¹ This information in this paragraph was derived from the musicians' contracts that were submitted into evidence, rather than from Employer's Exhibit 5, which included musical directors in its figures, a position I have excluded from the unit. The musicians' contracts show that, in 2008, eight musicians worked in only one show, two musicians worked in two shows, and four worked in three or more shows. In 2009, five musicians worked in only one show, four musicians worked in two shows, and five worked in three or more shows. Seven of the 14 musicians hired in 2009 were returnees from 2008, and six of the 14 musicians in 2008 were returnees from 2007.

¹² Reed player Zachary Chadwick, who worked for the Playhouse in 2007, 2008, 2009, testified that he did not negotiate his rate of pay; rather he was just told that he would be paid a certain rate and offered a room. He was unaware that the musicians could negotiate their rate of pay until some musicians told him in 2009 that they had done so.

¹³ Because Levinstein is not a musician, the musical directors provided some guidance to him, e.g., by recommending that they needed a top-notch drummer but that they could get away with something less for another instrument.

¹⁴ In one instance in 2008, the Playhouse used an Actors' Equity Association contract with respect to the hire of a guitarist, Louis Tucci, for the musical "Breaking Up is Hard to Do."

¹⁵ In 2006, some, but not all, of the musicians signed a “Musicians Agreement,” but also signed a separate “Independent Contractor” form in which they confirmed that they wished to be treated as an independent contractor who would be paid a fee, with no taxes withheld and no unemployment benefits.

¹⁶ Chadwick knows how to play four kinds of saxophones, two kinds of clarinets, the flute, the piccolo, and the recorder.

¹⁷ Sometimes the musicians receive the “books” by mail a couple weeks in advance but other times they do not receive the books until they arrive at the first rehearsal, in which case they are expected to sight read them. Sometime it is spelled out in advance which parts they will play and sometimes not.

¹⁸ For example, the choreographer may not have dancing for a certain section of the music.

¹⁹

The musical director knows, for example, when the lights are coming back up and how long a scene change is taking. The musical director will cue the musicians to play louder during the dancing segments of the show and softer during the acting segments.

²⁰

Contracts in evidence as Petitioner's Exhibits 12, 16, and 17 that were signed either in 2008 or the outset of the 2009 season included varying provisions concerning the right to subcontract, some of which seemed to permit subcontracting and some of which seemed to prohibit subcontracting, at least without permission:

The performer will be responsible for paying any subcontractors during the time frame of this contract.

...musician may not assign this agreement or any of musicians' rights or obligations hereunder without prior written approval of the Executive Artistic Director, provided that all the musician's services as musician hereunder must be performed personally.

It is expected that you will coordinate with the Musical Director to find an approved replacement for any performances that you are unable to fulfill for any reason.

Performers cannot assign this contract, rights or obligations to another without a contract amendment agreed upon by both the Producer and the Performer.

Exclusivity – The Performer will perform exclusively for the Producer throughout the actual period of services of this Agreement unless otherwise provided in writing. The Performer at the time of signing this agreement will not be under contract to a third party that might preclude the Performer from fulfilling the requirements of this Agreement.

Contracts in evidence as Petitioner's Exhibits 11, 12, and 13 that were executed after the end of June 2009 no longer included the "Exclusivity" provision and stated:

3. Payment:The Performer shall use his/her best efforts to attend all rehearsals and performances. The Performer may, at his/her own expense, subcontract for a replacement for any performance(s) that he/she is unable to attend due to extenuating circumstances. Any such replacements must be approved in advance by the Producer, which approval will not be unreasonably withheld. Performer will be responsible for paying any subcontractors during the time frame of this contract.

5. No Known Scheduling Conflicts: The Performer represents that at the time of signing this Agreement he/she is not under any contract to a third party that might preclude the Performer from fulfilling the requirements of this Agreement.

²¹ The one exception was Disney's High School Musical, for which the musicians were paid \$125 per show.

²² Even some musicians whose contracts were entitled “Independent Contractor” received W-2s and were treated as employees for tax purposes. See, e.g., some of the contracts in Petitioner’s Exhibit 16.

²³ BMA subpoenaed and submitted into evidence the musicians’ contracts from 2005-2009 and their related W-2 and 1099 forms from 2007-2009.

²⁴ That earlier petition was subsequently withdrawn.

²⁵ Those musicians who had previously signed contracts for services to be provided after July 1, 2009 were required to sign new contracts that included the revised language about independent contractor status and responsibility for taxes.

The new contracts are similar to prior forms of the contract in that they set forth the musicians’ agreement to play a certain instrument for a particular production, the relevant dates, and the compensation agreed to. The new contracts altered the language concerning the right to find substitute musicians in the manner described above in footnote 19.

²⁶

Around the same time, the Playhouse applied to the Maine Workers' Compensation Board for a "predetermination" of the musicians' independent contractor status, by submitting an application form with information about the position as well as a sample of the contract. Rubino testified that he does not know if the Workers' Compensation Board interviewed any musicians as part of the process. By letter dated September 2, 2009, the Workers' Compensation Board issued its predetermination that it found the musicians to be independent contractors, creating a rebuttable presumption that the determination was correct in any later claim for benefits made.

²⁷

As noted in footnote 20, above, under the "Exclusivity" provision in some prior versions of the musicians' contracts, the musicians contracted to perform exclusively for the Playhouse during the period of time covered by their agreements, unless otherwise provided in writing. Although this clause was removed from the version created for services provided after July 1, 2009, the prior and current version of the contract requires the musicians to represent that, as of the time of signing, they are not under any contract to a third party that might preclude them from fulfilling the requirements of the agreement.

²⁸

In addition to his work as a musician, Chadwick is employed as a software engineer.

²⁹ For example, clarinetist Zachary Chadwick testified that the musicians played on stage in the show “All Shook Up” and were given shirts to wear. He also played on stage for a production of “Fiddler On the Roof” for which the costume department provided him with a complete costume.

³⁰ 343 NLRB 846 fn. 1 (2004).

³¹ Id.

³² 343 NLRB 1017, 1020 (2004).

³³ Thus, I disagree with the contention of the Playhouse that the musicians’ work is not part of its regular business because the Playhouse is in the theater business and not the music business. The Playhouse is in the business of presenting summer stock theater, predominantly musicals, and the musicians are an integral part of their performances.

³⁴ 275 NLRB 677, 681-682 (1985).

³⁵ Regional Director's Decision and Direction of Election, Case 4-RC-21019, issued June 9, 2005. I take administrative notice that, on July 6, 2005, the Board denied review of the Regional Director's Decision.

³⁶ 332 NLRB 1522, 1522 (2000), enforced, *Corporate Express Delivery Systems v. N.L.R.B.*, 292 F.3d 777 (D.C. Cir. 2002) (owner-operators who have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss are not independent contractors); cf., *FedEx Home Delivery vs. N.L.R.B.*, 563 F.3d 492 (D.C. Cir. 2009) (contractors who, *inter alia*, may operate multiple routes, hire additional drivers, and sell, trade, or give away their routes without permission have entrepreneurial opportunity that favors a finding of independent contractor status).

³⁷ I note, in any event, that the difference between the highest and lowest negotiated weekly salary negotiated in 2009 was small, \$125 per week, and that the amounts negotiated by some musicians for reimbursement of transportation costs- \$20 to \$60 – are insignificant.

³⁸ See, e.g., the clause in the revised 2009 contracts that provides “Any such replacements must be approved in advance....”

³⁹ Thus, the revised 2009 contracts provide that “The Performer shall use his/her best efforts to attend all rehearsals and performances. The Performer may...subcontract for a replacement for any performance that he/she is unable to attend due to extenuating circumstances....The Performer represents that at the time of signing this Agreement he/she is not under any contract to a third party that might preclude the Performer from fulfilling the requirements of this Agreement.”

⁴⁰

Although, due to the removal of the exclusivity clause from the current contracts, musicians are no longer required to perform exclusively for the Playhouse for the duration of the show, I note that they are still required to represent that they are not under any contract to a third party that would preclude them from fulfilling their obligation to the Playhouse.

⁴¹

While the musicians' tax status is not dispositive, I note that, until recently, musicians were given the option to be treated as employees or not for purposes of their tax status.

⁴²

Supra.

⁴³ Id. at 145.

⁴⁴ 249 NLRB 265, 280 (1980) (ALJD).

⁴⁵ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

⁴⁶ 348 NLRB 686 (2006).

⁴⁷ *Id.* at 689.

⁴⁸ Id. at 689-692.

⁴⁹ Id. at 693.

⁵⁰ Id.

⁵¹ Id.

⁵² Supra, 275 NLRB at 680-681.

⁵³

The Union takes the position in its post-hearing brief that whether the musical directors are themselves employees of the Playhouse or independent contractors is not relevant to the determination of the musicians' status as independent contractors or employees. In its post-hearing brief, the Playhouse, apparently citing Rubino's testimony, stated that the musical directors are hired as independent contractors.

⁵⁴ 306 NLRB 660 (1999).

⁵⁵ 342 NLRB 69 (2004).

⁵⁶ 200 NLRB 1013 (1972).

⁵⁷ 207 NLRB 621 (1973).

⁵⁸ 208 NLRB 153 (1974).

⁵⁹ 328 NLRB 660 (1999).

⁶⁰ Supra, 342 NLRB at 71-72.

⁶¹ Supra.

⁶² 349 NLRB 122 (2007).

⁶³ 350 NLRB 523 (2007).

⁶⁴

In its post-hearing brief, the Union requests a mail ballot election due to the nature of the Playhouse operation and the domiciles of the musicians. I shall determine the details of the election, including the appropriateness of a mail ballot election, administratively.

⁶⁵ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

⁶⁶ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.

Finally, the Union asserts that the musical directors employed by the Playhouse should be excluded from any unit found appropriate as statutory supervisors, while the Playhouse would include them as non-supervisory employees.

I find that the musicians are statutory employees rather than independent contractors. I find that the musical directors are statutory supervisors and independent contractors and shall exclude them from the unit on both grounds. Finally, musicians will be permitted to vote to the degree they meet the eligibility standard set forth below.

INDEPENDENT CONTRACTOR STATUS OF THE MUSICIANS

Background

The Playhouse, which is located in Ogunquit, Maine, is a non-profit organization that presents live theater performances each year for about 21 weeks from Memorial Day through Columbus Day. The Playhouse typically presents five to six different productions each season, which are predominantly musicals. The Playhouse also operates a children's theater program during the summer called the Rising Stars Program.³

Playhouse operations are overseen by a Board of Directors. General Manager Frederick Rubino, who is responsible for business operations at the Playhouse, reports directly to the Board.⁴ Rubino oversees a business manager, who is responsible for the human resources function, and various other managers who are responsible for facility maintenance, food and beverage sales, ushering, and box office sales. These managers oversee, variously, staff in accounting, maintenance, bartending, concessions, kiosk, and the box office.

Executive Artistic Director Brad Kenney, who is responsible for artistic matters at the Playhouse, also reports directly to the Board. He oversees Director of Production Robert Levinstein, who oversees, in relevant part, the director/choreographer, music director, and stage manager for each production.⁵ The director/choreographer oversees the actors in each production, while the music director oversees the musicians.

The Playhouse has a staff of about 200. Ten of the Playhouse staff are employed full-time and year-round: the executive artistic director, general manager, director of production, business manager, box office manager, facility manager, marketing director, community relations director, sponsorship/ad representative, and digital marketing director. These individuals are all salaried and receive benefits, such as vacation and sick time, medical and dental insurance, a retirement plan, and coverage for worker's compensation and unemployment insurance. Taxes are withheld from their pay, and they receive W-2s for tax purposes.

Some of the staff, including the lighting crew, sound crew, stage hands, food and beverage employees, retail sales employees, box office staff, and house manager, are hired for the entire season. Some are salaried and some are paid by the hour. They are covered by workers' compensation and unemployment insurance. They receive no vacation or sick time nor any other benefits. Taxes are withheld from their pay and they receive W-2s for tax purposes.

Other individuals, such as actors, musicians, musical directors,⁶ directors/ choreographers, lighting designers, set designers, and sound designers, are hired on a show-by-show basis. Among this group, the directors/choreographers and various designers are hired as independent contractors, as are a few nationally recognized actors who are incorporated and have their own insurance. These individuals receive no vacation, sick time, or any other benefits and are not eligible for workers' compensation or unemployment compensation. They receive 1099s for tax purposes.

The actors, other than the "big name" actors, are also hired on a show-by-show basis but are covered by a collective-bargaining agreement with the Actors' Equity Association. They receive W-⁷2's for tax purposes.

The hiring process

Executive Artistic Director Kenney is responsible for selecting the Playhouse productions each year, based on preferences indicated in audience surveys as well as on the availability and pricing of the license, sets, and costumes. This process takes place from about December to May for the following season. Most shows are performed for three to five weeks and are in rehearsal for about two weeks prior, although the musicians, who are at issue in this case, attend only two rehearsals. The Playhouse determines the days and hours of each of the performances. A traditional show is⁸ performed eight times per week.

Having identified a show, Kenney and Director of Production Levinstein hire a director for the show, who is responsible for directing the actors and for handling the choreography. They also hire a musical director for each show that requires musicians.⁹ The Playhouse hires multiple musical directors during the course of a season, although some are hired for more than one show. Kenny or Levinstein work out the general terms with the musical director and then notify the business office, which sends out a standard contract setting forth the terms. Rubino testified that the musical directors are hired as independent contractors.

The musical director is responsible for determining the number and type of musicians needed for the show. In this regard, the scores for most musicals are designed for a complement of 20 to 22 musicians. Due to budgetary considerations and the size of the “pit” in which the musicians play, the Playhouse generally hires only four to seven musicians per show, some of whom will play two or more instruments. The musical director reviews the score for the musical to determine which of the 20 to 22 instruments are needed and relays his or her list to the executive artistic director or director of production. In addition to conducting the other musicians, the musical directors often, but not always, play in the show themselves; they are typically keyboard players themselves and may also accompany the actors during rehearsals.

At this point in the process, at least through the 2008 season, Kenney or Levinstein contacted a “musical contractor” based in New York, Stephen Purdy, who found musicians for each type of instrument requested who were interested and available for the show.¹⁰ The Playhouse does not audition musicians or provide the musical contractor with a list of acceptable musicians; the musical contractor is supposed to know if they are qualified.

The musicians are free to turn down job offers without repercussion and, if they do, may be offered work in other shows for which they are available. Most of the musicians work one to two shows per season, but a few work three to five shows per season. In the last two years, about half of the musicians hired had worked for the Playhouse in the previous season.¹¹

Once the musical contractor identified available musicians, Levinstein, who is responsible for the overall budget for the productions, or Business Manager Marsha Jones, contacted the musicians to negotiate an agreement with them with respect to their compensation, which might or might not include housing and transportation expenses, in addition to wages.¹²

Purdy resigned as musical contractor after the 2008 season. During the 2009 season, Director of Production Levinstein was himself responsible for finding the necessary musicians.¹³ Rubino testified that the Playhouse is currently interviewing for a new musical contractor for the 2010 season.

In any event, the practice is that, once the terms have been settled, the business manager sends out a written contract for the musicians to sign. The formats have varied over the years, but the contracts generally set forth the dates of the rehearsals and performances, the musicians' compensation, and various other terms.¹⁴ Some, but not all, of the 2008 contracts were entitled "Independent Contractor," while contracts from other years¹⁵ were untitled letters or were entitled "Musicians Agreement," "PerformAgreement," or, more recently, "Terms of Employment."

Artistic control

With respect to artistic control, the musical directors are responsible for the orchestration of the show. As noted above, prior to the hiring of any musicians, the musical director determines the number and type of musicians who will be hired by reducing a score intended for a 20-piece orchestra to a score for four to seven musicians. The musical director also determines which particular part of the score each musician will play. Reed player Chadwick testified that the orchestration for a typical show is intended for five different woodwind players playing five different “books.” Chadwick typically plays four to five different woodwind instruments during the same show at the Playhouse.¹⁶ Prior to the first rehearsal, the musical director decides which are the important parts and tells him which book or instrument to play at any given time. In some cases, the musical director dictates which part to play, and in others the musical director narrows it down to two choices. The musical directors do the same with the brass and trombone players.

The musicians are required by their contracts to attend rehearsals. Chadwick testified that there are generally two rehearsals for every show. The first rehearsal usually takes place on a Sunday without the cast, in a rehearsal space, typically from noon to 5 p.m. The musicians must arrive in advance to set up their instruments so they are ready to play at the start time. It is understood that they will play all the notes correctly, at least by the second rehearsal, and may have to practice on their own time in order to be ready.¹⁷ At the rehearsal, the music director may make or change the orchestration decisions (i.e., who plays which part). Based on collaboration with the director and/or choreographer, the music director may tell the musicians to lengthen the music by repeating a section or to shorten the music by omitting a section.¹⁸ The musical director may change the key of the music to accommodate a singer or due to an artistic decision about the overall feel of a song. The musical director tells the musicians in what order and how many times each song will be rehearsed.

There is generally a dress rehearsal in the theater on a Tuesday with the entire cast, which starts with a sound check, during which the sound crew that handles the microphones and monitors has the musicians play their instruments individually to obtain the right levels of sound. At the end of the Tuesday rehearsal, the musical directors tell the musicians what time to arrive prior to the performance, i.e. the “call time,” usually a half hour to forty five minutes depending on the need to rehearse or change something.

At both the dress rehearsal and subsequent performances, the musical directors conduct the musicians. The musical directors watch the show either on stage directly or on a monitor, in order to give cues to the musicians, who watch the conductor constantly. They tell the musicians when to start and stop the music and give cues as to tempo and volume.¹⁹

The use of substitutes

The musicians’ contracts have included varying language in the past concerning their right to provide a substitute.²⁰ Regardless of the contract language, Rubino testified that the musicians are permitted to arrange for substitutes and that musicians will usually obtain substitutes for themselves once or twice during a five-week run. Rubino testified that musicians are supposed to ask permission to use a substitute but that they rarely do, and that there is no list of acceptable substitutes. Musicians are responsible for hiring, training, and paying their own substitutes, with whom they negotiate over the rate of pay. Rubino testified that, if the musician sends an unsatisfactory substitute, the band as a group tells the musical director, who tells the musician not to send that substitute any more.

Reed player Zachary Chadwick used a substitute three times over the 2008 and 2009 seasons. On one occasion in 2008 and one in 2009, Chadwick told the musical director and Levinstein in advance, at the time he was hired for the show, that he would be unavailable to play during a particular weekend due to another musical engagement and would provide a substitute. Chadwick testified that he told the musical director that a substitute was coming but he did not have to tell anyone at the Playhouse who the substitute would be. Chadwick picks substitutes based on his past experience with them and their familiarity with the style of music. In one of those instances, Chadwick paid the substitute more than he, himself, was earning for the weekend in order to entice the substitute to play and to compensate him for the burden of having to learn the music. On another occasion in 2009, when Chadwick became ill at the last minute for an entire week of a show, the Playhouse found a substitute for him. In that case, Chadwick did not negotiate the substitute's wages but simply wrote the check for his weekly salary over to the substitute.

Compensation

For the various 2009 productions, the musicians were generally paid a weekly salary in amounts ranging from \$650 to \$775.²¹ They were also paid a flat fee of \$60 for each rehearsal and \$20 for a sound check. Rubino testified that about half of the musicians are provided with housing. Some, but not all, were reimbursed for transportation expenses in small amounts ranging from \$25 to \$60. The musicians receive no benefits such as vacation pay, sick pay, or insurance. They do not receive coverage for workers' compensation or unemployment insurance. They are not subject to a personnel manual to which the full-time employees and some of the seasonal employees are subject.

Tax status

At least as far back as 2007 and 2008, the musicians were given an option, at the time of hire, as to whether they preferred to have taxes withheld from their pay and receive a W-2 for tax purposes or to have no taxes withheld and receive a 1099 form for tax purposes.²² Rubino testified that he became aware for the first time at the hearing that the business manager, who reports to him, had withheld taxes for some musicians at their request in 2007 and 2008.²³ He testified that this was a mistake and contrary to “policy,” albeit an unwritten policy, i.e. the fact that musicians have signed independent contractor agreements si

At the end of 2008, the insurance carrier who handles the workers’ compensation policy for the theater requested that the Playhouse treat the musicians as employees. As a result, at the beginning of the 2009 season, the Playhouse business manager had all musicians complete W-4 forms for the 2009 season and, for a period of about seven weeks, treated them as employees for tax purposes by deducting taxes from their pay. Thereafter, the Union filed a petition covering the same musicians at issue in this petition on June 10, 2009.²⁴ Rubino testified that it was not until the petition was filed that he became aware, for the first time, that the Playhouse had been treating the musicians as employees. Thereafter, Rubino changed the current and future contract language for any services to be performed by musicians after July 1, 2009, so that all musicians’ contracts included a clause that reads, “It is understood that as an Independent Contractor, the Performer is responsible for his/her own insurance, and taxes including FICA, FUTA, and SUTA.”²⁵ The Playhouse refunded to the musicians any taxes and deductions that had already been withheld from their pay for the 2009 season and treated them as independent contractors for purposes of their tax status in 2009.²⁶

Other factors

Most of the musicians are highly trained professional musicians who are experienced in musical theater. The musicians are responsible for providing and maintaining their own instruments, except for a keyboard provided by the Playhouse. Insurance on the instruments, if any, is provided by the musicians.

The musicians have other jobs apart from their employment by the Playhouse.²⁷ Some teach music at the high school or university level. They may work for other theaters, orchestras, or bands. Some have business cards or websites advertising their services as musicians. Musician Zachary Chadwick testified he is a freelance musician.²⁸ He plays in 15-20 stage shows per year, including Broadway-style shows put on by the Playhouse. He plays in various jazz groups and other bands once or twice a month, and performs with a church choir group in Bermuda on an annual basis. He does not play other jobs during the time he works in Ogunquit. In 2008, he played 19 weeks in Ogunquit and nowhere else during that time. In 2007, he played less time in Ogunquit and more time elsewhere.

With respect to a dress code, for shows in which the musicians play in “the pit,” they are directed to wear black clothing, so as not to be a distraction to the audience. For shows in which they play backstage and are not seen at all, the musicians may wear street clothes. When the musicians appear on stage, they are provided with costumes by the costume department.²⁹

Analysis

Section 2(3) of the Act provides that the term “employee” shall not include “any individual having the status of independent contractor.” In determining whether an individual is an employee or an independent contractor, the Board generally considers the following factors, derived from the common-law Restatement of Agency, to be among those relevant to the inquiry: (1) the length of time the individual is employed; (2) the method of payment, whether by the time or by the job; (3) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (4) whether the individual is engaged in a distinct occupation or work; (5) whether the employer is “in the business;” (6) the skill required in the particular occupation; (7) whether the employer retains the right to control the manner and means by which the result is accomplished; (8) whether the parties believe they are creating an employment relationship; (9) whether the work in question is part of the employer’s regular business; and (10) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain.

³⁰
Pennsylvania Academy Fine Arts.

The determination of whether or not an individual is an independent contractor is quite fact-intensive, and no single factor is controlling in making this determination. The burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. ³¹*BKN, Inc.*; ³²*Argix Direct, Inc.*

I find that the Playhouse has failed to meet its burden of proving that the musicians are independent contractors rather than statutory employees. In support of my finding that the musicians are employees rather than independent contractors, I note that the musicians’ work, the performance of ³³music in Broadway-style musicals, constitutes the regular business of the Playhouse. The Playhouse provides the venue for their work. With the exception of flat fees for rehearsals and sound checks, the musicians are paid by the week rather than by the performance. The Playhouse imposes a dress code on the musicians. With respect to length of employment, although the musicians are hired on a show-by-show basis, there is a core of employees who have been regularly hired, which is indicative of an employment relationship.

Importantly, substantial artistic control over the musicians' performance is vested in the Playhouse and in the musical directors, whom I find for the reasons set forth below to be statutory supervisors, rather than in the musicians. In this regard, the Playhouse selects the musicals to be performed, supplies the music to the musicians, and dictates the dates and times of rehearsals and performances. The musical directors are responsible for the orchestration of the music, dictating both the composition of the band and the parts of the score and/or instruments that each individual musician will play in a given musical number. The musical director dictates to the musicians the order and number of times each song will be rehearsed, whether sections of the music will be repeated or omitted, and whether the key should be changed. The musical director tells the musicians what time to arrive prior to each performance. While conducting the music, the musical directors cue the musicians as to when to start and stop the music and give cues with respect to tempo and volume.

The Board has found the degree of artistic control to be an important factor in determining the independent contractor status of musicians. Thus, in *Royal Palm Theater*,³⁴ the Board found that the musicians were employees and not independent contractors, because they were subject to the complete discretion and artistic interpretation and taste of the musical director, who could not have exercised more control over the manner and means of the musical performance. In that case, the musical director selected the number and types of instruments to be used, selected the time and place for the session, directed every note to be played by the musicians, demonstrated how the music was to be played, decided the time necessary for rehearsal before actual recording, decided whether additional time was necessary, decided when breaks were to be taken, and determined the seating arrangements of the musicians. Accord, *Chamber Orchestra of Philadelphia*,³⁵ in which the Board denied review of the Regional Director's determination that orchestra musicians were employees rather than independent contractors, where the employer controlled where, when and how long each of its musicians would rehearse and perform, the employer decided what music would be played and which of its musicians would perform the music, and the employer set rules as to the lengths of rehearsals and the musicians' timeliness and appearance. These factors were found to be strongly indicative of employer control over the manner and means of performance of the work.

I find that the musicians' risk of entrepreneurial loss or opportunity for gain is too minimal to confer independent contractor status. The Board has held that the opportunity for entrepreneurial gain or loss must be "significant" to constitute an indicium of independent contractor status. *Corporate Express Delivery Systems*.³⁶ Here, the musicians have no proprietary interest in the shows; they do not invest any money in the shows that could be lost, while their compensation is fixed and not dependent on the financial success of the shows. Contrary to the Playhouse's assertion, the fact that the musicians have an opportunity to negotiate over the amount of their own compensation is does not demonstrate independent contractor status, as statutory employees may also negotiate over their compensation.³⁷

I reject the assertion by the Playhouse that the musicians' ability to hire their own substitutes demonstrates that they bear the risk of entrepreneurial loss or enjoy the opportunity for gain. First, it appears that the musicians need permission to provide a substitute. Rubino's general testimony that musicians rarely ask permission to use a substitute is insufficient evidence that this is so, where (1)³⁸ the contracts signed by the musicians specify that musicians do need permission to hire a substitute, and (2) Rubino provided no specific examples of any occasion in which musicians brought in substitutes without first seeking permission to do so. In fact, the only specific exof substitution in the record involved two occasions in which Chadwick obtained permission, prior to being hired, to use a substitute on a particular weekend and one occasion in which Chadwick notified the Playhouse of the need for a last-minute substitute due to his illness, after which the Playhouse found a substitute for him. Second, both the specialized nature of the work and language in the musicians' contracts suggest that substitution is not a frequent occurrence, as the parties clearly intend for the musicians to personally fulfill their commitment to perform in the shows, except in extenuating circumstances.³⁹ In these circumstances, I find the musicians' occasional ability to select the particular musicians who will be their substitutes, once permission to use a substitute has been granted, and their obligation to pay their own substitutes is insufficient to confer independent contractor status.

In concluding that the musicians are statutory employees, I acknowledge that certain factors support a finding of independent contractor status. Thus, the musicians work on a show-by show basis. The musicians are highly skilled workers. They must come to rehearsals prepared to play the music, necessitating them to practice on their own time to some degree. They provide their own musical instruments and are responsible for maintaining and insuring them. They are free to decline offers of work from the Playhouse and have the ability to work for other employers.⁴⁰ They receive no benefits other than housing and reimbursement of transportation costs, and the Playhouse no longer withholds taxes from their pay.⁴¹

I find, however, that these factors are not dispositive. I note that statutory employees may work on a part-time basis for more than one employer and that some of the seasonal workers whom the Playhouse treats as employees similarly receive no benefits. More important, in cases involving artistic endeavors, the Board has found artists to be statutory employees despite these factors, emphasizing the artists' lack of artistic control, their lack of significant entrepreneurial discretion, and the fact that they are engaged in the regular business of the employer. Thus, in *BKN, Inc.*,⁴² the Board found that writers for a television series who provided their own equipment and materials, signed agreements to work on each episode, were paid per episode, could work for other employers, received no benefits, and did not have taxes or other payroll deductions withheld, as well as freelance artists and designers who were free to work for other employers while employed by the employer, were not independent contractors, where their employer exercised extensive control over the details of their work and/or the workers had no substantial proprietary interest or significant entrepreneurial opportunity for gain or loss. Specifically, the Board stated:

The fact that the writers are hired and work on a script-by-script basis explains the absence of some of the usual indicia of employee status here, but this industry's working arrangements do not diminish the central fact that the record establishes that the Employer closely directs⁴³ the writers' work performance.

I find *Pennsylvania Academy Fine Arts*, on which the Playhouse relies, to be distinguishable. In that case the Board found individuals who modeled for art classes to be independent contractors, in part because they had the freedom to accept as many or as few modeling jobs from the Academy as they wished and the freedom to work as models for other schools or independent artists, which allowed them to control their earnings. The Board also supported its finding on other factors not present in this case, however. The Board noted that the Academy did not supervise the quality of models' work and set only a general requirement for a pose, with the particular manner of fulfilling that requirement left up to the discretion of the model. The Board also noted that the Academy and the models were in different businesses, the Academy being in the business of providing instruction to art students and the models in the business of modeling. Here, the Playhouse not only supervises the quality of its musicians' work but exercises significant control over the manner in which they play. Unlike the models in *Pennsylvania Academy of Fine Arts*, the musicians are engaged in the regular business of their employer.

Finally, to the degree that the Playhouse relies on the predetermination of the State of Maine Workers' Compensation Board that the musicians are independent contractors, the finding of another state agency is not controlling for the Board and has little persuasive value, where it was based solely on the Playhouse's *ex parte* application, without the benefit of a hearing. *Suburban Yellow Taxi Company*⁴⁴ (while the finding of another government agency is a factor to be considered in determining independent contractor status, it is insufficient to affect the Board's determination, where it was based on the employer's *ex parte* application to the Internal Revenue Service).

INCLUSION OF THE MUSICAL DIRECTORS

Supervisory status of the musical directors

The Union contends that the musical directors are statutory supervisors by virtue of their authority to responsibly direct the musicians and their authority to effectively recommend terminations.

Responsible direction and assignment

The facts concerning the musical directors' authority to responsibly direct and assign the musicians are set forth above in the section entitled "Artistic control."

According to the musical directors' 2009 contracts, they must act during the production "to the satisfaction of the Director and/or Producer" and are subject to being terminated "due to unsatisfactory skills, performance or artistic differences."

Effective recommendation of terminations

Rubino testified that in the event of a disciplinary problem among the musicians, the musical director notifies the director of production, who lets the musician go. This usually happens once or twice a year at most. He testified that the musical director ultimately makes the decision but also that the band collaboratively decides if they cannot play with a musician.

Rubino testified about one instance in which a musical director approached Levinstein to tell him that a musician named Buyak was not going to work out because of poor performance during the rehearsal period. Levinstein and Kenney terminated Buyak's contract. Rubino testified that there have been other such instances but could not recall any specifics.

Musician Zachary Chadwick testified that he was unaware of any musicians being disciplined or asked to leave.

Analysis

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.⁴⁵ In *Oakwood Healthcare, Inc.*,⁴⁶ the Board refined its analysis of the terms "assign," "responsibly direct," and "independent judgment" in assessing supervisory status. The Board announced that it construes the term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee."⁴⁷

With respect to “responsible direction,” the Board explained in *Oakwood* that, if a person has “men under him” and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. For direction to be “responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect⁴⁸ of adverse consequences for the putative supervisors if they do not take these steps.

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”⁴⁹ “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”⁵⁰ The Board also stated⁵¹ that the degree of discretion exercised must rise above the “routine or clerical.”

The Union has met its burden of proving that the musical directors responsibly direct the musicians. I find, first, that the musical directors do direct the musicians. In this regard, the musical directors are responsible for the orchestration of each show, which includes determining which part of the score each musician will play in any given song. At rehearsals, the musical directors dictate the order and number of times each song will be rehearsed. They direct the musicians to repeat or omit certain sections of the score or to change the key of a song. During the rehearsals and performances, they conduct the music, cuing the musicians when to start and stop each musical number and giving cues as to tempo and volume. I also find that the musical directors use independent judgment in giving these directions. Thus, the musical directors’ superiors are not trained musicians; the musical directors make these artistic judgments based solely⁵² on their own musical expertise and free of the control of others. *Musicians (Royal Palm Theater)* (music director/conductor was a supervisor, where he selected the types of instruments to be used, determined the hours to be worked, decided whether additional time was necessary, was present at all times during the session and was the only representative of the Theater present, so that the end product was subject to his independent discretion and artistic taste). Finally, it is evident that the musical directors are held accountable for the musicians’ performance, as required by *Oakwood*, in that, under the terms of their contracts, the musical directors are subject to termination due to poor performance by the band.

I also find that the musical directors exercise independent judgment in assigning work to the musicians, within the meaning of *Oakwood*. Thus, telling the musicians which instrument or which of several parts they will play in a given song constitutes assignment of a significant overall duty, and setting the call time prior to the performance based on the need for further rehearsal constitutes assignment to a time.

I further find that the musical directors are statutory supervisors on the additional ground of their authority to effectively recommend the termination of musicians. Thus, there is evidence that once or twice a year, musical directors have recommended the termination of a musician to the director of production, who has let the musicians go. There is no evidence of any independent investigation by the director of production into these matters. I note that, in the case of termination for reasons related to musical performance, the director of production, who has no musical training, would not be in a position to challenge the judgment of the musical directors.

Independent contractor status of the musical directors⁵³

I find that the musical directors should be excluded from the unit on the additional ground that they are independent contractors. Although the evidence concerning the musical directors is similar to that concerning the musicians with respect to most of the factors weighed in determining independent contractor status, the musical directors differ from the other musicians in one important respect, i.e., their overwhelming artistic control over the musical product. Thus, as set forth above, control over the manner and means over which the musical result is accomplished is vested overwhelmingly in the musical directors: they determine the number and type of musicians needed for each show, which part or instrument each musician will play in each musical number, whether to lengthen or shorten the music, the key of each song, how many times each piece will be rehearsed and in what order, what time the musicians must arrive before each performance, and so on.

ELIGIBILITY FORMULA

As noted above, the Playhouse operates on a seasonal basis, for about 21 weeks from the end of May through mid-October. The Playhouse typically presents five to six different productions each season. Most shows run for three to five weeks, with eight performances per week.

All of the musicians are hired on a show-by-show basis. It appears that the Playhouse hired 14 different musicians in 2008 and 14 in 2009. As noted above, most of the musicians work one to two shows per season, but a few work three to five shows per season. About half of the musicians hired in 2008 and 2009 had worked for the Playhouse during the previous season.

Analysis

In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks to permit optimum employee enfranchisement and free choice, without enfranchising individuals who have no real continuing interest in the terms and conditions of employment offered by the employer. *Trump Taj Mahal Casino Resort*.⁵⁴ The Board's most widely used formula for voting eligibility for part-time or on-call employees is the *Davison-Paxon* formula, under which an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages four or more hours of work per week for the last quarter prior to the eligibility date. *Steppenwolf Theater Co.*⁵⁵

In the entertainment industry, where employees are often hired to help out on a day-by-day basis or production-by-production basis, the Board has sometimes held that the irregular patterns of employment present a special circumstance warranting deviation from the *Davison-Paxon* formula. *Medion, Inc.*⁵⁶ (employees eligible who worked two productions for five days over one year); *American Zoetrope Productions*⁵⁷ (two productions during the past year); *Juilliard School*⁵⁸ (two productions for a total of five days over one year or at least 15 days over a two-year period); *DIC Entertainment, L.P.*⁵⁹ (two productions for a minimum of five working days in the last year or at least 15 working days in the last year).

In determining whether a deviation from *Davison-Paxon* is warranted, the critical consideration is the employment pattern resulting from the number and length of the employer's stage productions, and the Board also considers the degree to which the employer relies on permanent staff versus per diem employees to perform the majority of its work. *Steppenwolf Theater Co.*⁶⁰ In *Juilliard School*, the Board found that special circumstances existed where the employer staged relatively few events each year, which ran for three or four performances at the most, and relied almost exclusively on per diem employees. Applying that standard in other cases involving theaters and orchestras, the Board has sometimes rejected application of the *Juilliard* standard, finding no special circumstances that warranted deviation from the standard *Davison-Paxon* formula. See, *Steppenwolf Theater Co.*⁶¹ (employer mounts 14 productions a season, totaling some 500 performances over the course of 48 to 50 weeks a year, productions typically run five to eight performances a week for up to eight weeks, and a substantial majority of the work is performed by permanent, full-time staff members); *Wadsworth Theatre Management*⁶² (employer put on at least four productions in 2006, with performances running for approximately four weeks each, two weekly movies series for 10 weeks each, plus other events on a year-round basis); *Columbus Symphony Orchestra*⁶³ (employer operates with a year-round 46-week schedule of performances and presented more than 170 performances in 2006, and its full-time staff perform the vast majority of the production work).

I find that a deviation from the *Davison-Paxon* formula is warranted by the unusual employment pattern in this case. Thus, the Playhouse has no permanent musicians and relies exclusively on musicians who work on a show-by-show basis. The Playhouse operates seasonally for only about 21 weeks per year and is currently in the off-season. Thus, an alternative eligibility formula is required.

The Union has proposed a formula under which musicians who have worked in two productions over the past two seasons would be eligible to vote; the Playhouse has not proposed any particular formula. I find that some evidence of recent employment by the Playhouse should be required, so that only employees with a continuing interest in employment at the Playhouse are eligible. Therefore, musicians who have been employed by the Playhouse in at least two productions within the two seasons immediately preceding the date of this Decision, at least one of which occurred within the 2009 season, shall be eligible to vote.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All musicians, assistant musical directors, and associate musical directors employed by the Employer at its Ogunquit, Maine facility, but excluding musical directors, counselors in the children's theater program, all other employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Boston Musicians' Association, a/w American Federation of Musicians, Local Union No. 9-535, AFL-CIO. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.⁶⁴

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before March 18, 2010. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlrb.gov,⁶⁵ by mail, or by facsimile transmission at (617) 565-6725. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by March 25, 2010. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,⁶⁶ but may not be filed by facsimile.

Dated at Boston, Massachusetts
this 11th day of March, 2010

/s/ Ronald S. Cohen

Ronald S. Cohen, Acting Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
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